SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 19832
S.C. 19833

DONNA L. SOTO, ADMINISTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL

V.

BUSHMASTER FIREARMS INTERNATIONAL, LLC, A/K/A, ET AL

BRIEF OF DEFENDANTS-APPELLEES

TO BE ARGUED BY: JAMES VOGTS AND CHRISTOPHER RENZULLI

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I. INTRODUCTION

Plaintiffs seek to change tort law in Connecticut dramatically by asking this Court to recognize a theory of liability that has no precedent here or in any other jurisdiction. Plaintiffs' theory is that a business, which lawfully sold a legal product to a qualified adult purchaser, may be liable for damages when a third person, whom the seller never encountered or knew, later acquired the product and intentionally used it to cause harm. Plaintiffs press their theory in the face of the PLCAA, a federal statute enacted to protect firearm manufacturers and sellers from having to defend themselves against claims exactly like those made here. Congress enacted the PLCAA because it viewed such claims as an abuse of the legal system, without foundation in the law, and as improper attempts to circumvent the legislative branches of government.

Congress provided exceptions to immunity under the PLCAA. One exception is an action for negligent entrustment against a firearm seller. Plaintiffs describe their theory as negligent entrustment, but its resemblance to negligent entrustment is only superficial. Rather, it is a confused amalgam of language and principles drawn from various tort doctrines for the purpose of thwarting the threshold statutory immunity to which defendants are entitled. A properly pleaded negligent entrustment cause of action, under the PLCAA exception, Connecticut law or any recognized formulation, depends on an essential factual allegation—that the seller had actual or constructive knowledge that the person to whom it sold the product was not competent to use it safely, but was likely to, and did, use the product to cause harm. Plaintiffs have not made this allegation.

The retail seller of the firearm involved in the shooting was Riverview Sales, Inc., ("Riverview"). Its purchaser was Nancy Lanza. Plaintiffs do not allege that Riverview was given actual or constructive notice that Ms. Lanza was a person who could not be trusted to

use the firearm safely or lawfully, or that she was likely to use it to cause harm. Plaintiffs' allegations against Riverview fall woefully short of stating the essential elements of a negligent entrustment action.

There is also no basis to distort the negligent entrustment doctrine further by reaching up through the lawful chain of commerce to the firearm's manufacturer Bushmaster Firearms International, LLC ("Bushmaster") and wholesale distributor, Camfour, Inc. ("Camfour"). Neither Bushmaster nor Camfour were present when Riverview Sales sold the firearm to Nancy Lanza, and plaintiffs have not alleged that either Bushmaster or Camfour had knowledge of her qualifications to safely and lawfully use the firearm.

The firearm itself was a commonly owned rifle possessed by millions of persons across the country, including in Connecticut. Under laws in effect at the time, persons residing in Connecticut who were qualified under both federal and state law to possess firearms and who were specifically approved by the state following completion of a background check, could legally purchase the rifle sold to Ms. Lanza. Plaintiffs' strident effort to demonize the rifle, a firearm that the Connecticut General Assembly determined could be legally possessed, is immaterial to the questions of law in this appeal.

Legislatures have long been recognized as the branch of government equipped to balance competing points of view and make sensitive policy judgments concerning firearms. The General Assembly's determination that it was appropriate for law-abiding residents to possess the firearm involved in this case is entitled to substantial deference under basic separation of powers principles. A common thread in many similar cases is the refusal by courts to recognize a mere sale of a firearm to be tortious conduct when legislatures had already determined the sale to be lawful. To hold that a product seller may be liable in tort

when someone completely unknown to the seller intentionally uses a product to deliberately cause harm would make sellers *de facto* insurers of their products in Connecticut.

Plaintiffs also argue that their allegations support an action under CUTPA, and that their CUTPA allegations fit within a separate exception to PLCAA immunity allowing for actions based on knowing violations of statutes applicable to the sale and marketing of firearms. Plaintiffs' CUTPA claims were properly stricken by the trial court on the ground that they do not have standing because they are not consumers, competitors or persons in commercial relationships with defendants. Plaintiffs' CUTPA claims also fail on multiple alternative grounds, including that: plaintiffs failed to file suit within the CUTPA statute of limitations period; the exclusivity provision in the CPLA bars plaintiffs' CUTPA allegations; wrongful death damages are not recoverable under CUTPA; and an alleged CUTPA violation does not circumvent PLCAA immunity because CUTPA is not the type of statute that Congress intended to serve as a predicate statute.

The crimes that occurred at Sandy Hook Elementary School were horrific, and the losses suffered by the plaintiffs were immense. But basic principles of law should not be discarded simply to serve the exigencies of particular cases. The principle that the law should be predictably and consistently applied has a rightful place in Connecticut jurisprudence, and it should be followed in this case.

II. STATEMENT OF FACTS

The trial court granted defendants' motions to strike plaintiffs' First Amended Complaint, finding that plaintiffs' allegations were legally insufficient to support claims for negligent entrustment and violation of CUTPA. A133.[1]

[1] Plaintiffs' lengthy statement of facts is unnecessary to the Court's plenary review of the legal issues in this case. Their statement of facts is also replete with unsupported statements

A. The Firearm Was Lawfully Manufactured, Sold and Possessed under Federal and Connecticut Law.

The Bushmaster XM-15 rifle (hereafter "the firearm") used in the shooting was an AR-type rifle. A75-76, ¶¶88-92. The firearm was lawfully sold in 2010, and was lawful for Connecticut residents to own pursuant to laws enacted by the Connecticut General Assembly. *See* Gen. Stat. § 53-202a (2001); Gen. Stat. § 29-36l (2005); *see also* 18 U.S.C. § 921(g). The firearm shared similar design features with rifles owned by millions of Americans that make them suitable for lawful civilian purposes, such as hunting, target shooting, and self-defense. *Shew v. Malloy*, 994 F.Supp.2d 234, 245 (D. Conn. 2014), *aff'd in part, rev'd in part*, *sub nom*., *New York St. Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d. Cir. 2015), *cert denied sub nom*., *Shew v. Malloy*, 136 S.Ct.2486 (2016).

Like all AR-type rifles, the firearm was semi-automatic, and fired only one shot with each pull of the trigger. *Staples v. United States*., 511 U.S. 600, 602 n.1 (1994). In contrast, a fully automatic firearm fires repeatedly when the trigger is pulled. *Id*. AR-type rifles typically have a grip protruding beneath the rifle's action for the trigger hand and, like nearly all semi-automatic firearms, accept detachable ammunition magazines with various capacities. *New York St. Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 364 (W.D.N.Y. 2013), *aff'd in part, rev'd in part*, 804 F.3d 242 (2d. Cir. 2015), *cert denied sub nom*., *Shew v. Malloy*, 136 S.Ct. 2486 (2016).[2]

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in violation of Practice Book § 67-4(c), and much of it is irrelevant, argumentative and needlessly inflammatory. *See Ravitch v. Stollman Poultry Farms, Inc*., 165 Conn. 135, 137 n.2 (1973) (recognizing that such content in a brief can be stricken). Plaintiffs' inflammatory and politically hued characterization of the firearm as a "weapon of war" is belied by its lawful ownership by civilians throughout the United States, including in Connecticut. *See* Gen. Stat. § 53-202d(a)(2)(A) (2013).

[2] The service rifle used by the U.S. Military is the M-16. *Hollis v. Lynch*, 827 F.3d 436, 440 n. 2 (5th Cir. 2016). The M-16 is capable of fully automatic fire. *Staples*, 511 U.S. at 603. The

The General Assembly first regulated the sale and possession of semi-automatic rifles by statute in 1993. Gen. Stat. § 53-202a *et seq*. (1993). The firearms subject to the statute were listed by make and model. Gen. Stat. § 53-202a (1993). Subject to certain exceptions, the designated firearms could not be sold or possessed in Connecticut. Gen. Stat. § 53-202d (1993). The firearm used in the shooting was not on the list of prohibited firearms. In 2001, the General Assembly acted again with respect to semi-automatic rifles. Gen Stat. § 53-202a *et seq*. (2001). The amended statute again listed prohibited firearms by make and model, and added a new category of prohibited firearms—those having two or more prohibited design features (*e.g*., a pistol grip, a flash suppressor). Gen. Stat. § 53-202a (2001). Subject to certain exceptions, the designated firearms could not be sold or possessed in Connecticut, Gen. Stat. § 53-202d (2001), and again, the firearm used in the shooting was not among the prohibited firearms. The 2001 statute was in effect at the time of the 2012 shooting at Sandy Hook Elementary School.

Bushmaster manufactured the firearm prior to March 2010 and transferred it to defendant Camfour, a federally-licensed wholesale firearms distributor. A83, ¶176. Camfour then sold the firearm before March 2010 to Riverview, a federally-licensed retail firearms dealer in East Windsor, Connecticut. A83, ¶¶176-178; A70, ¶27. Riverview sold the firearm in March 2010 to Nancy Lanza, the shooter's mother. A71, ¶32; A83, ¶182.

Before transferring the firearm to Ms. Lanza in March 2010, Riverview Sales initiated a background check on her with the Connecticut Department of Public Safety ("DPS"), which used the National Instant Criminal Background Check System to determine whether she was

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AR-type rifles manufactured and sold today are capable of only semi-automatic fire. *Id*. Military forces do not routinely carry AR-15 rifles or other semi-automatic rifles as service weapons. *Kolbe v. Hogan*, 849 F.3d 114, 159 (4th Cir. 2017) (Traxler J., dissenting).

eligible to acquire and possess the firearm under federal and state law. Gen Stat. § 29-36l (2005). She passed the background check and was approved by the DPS to purchase the firearm. Riverview had no reason to believe Ms. Lanza was otherwise ineligible to acquire the firearm under the law. 18 U.S.C. § 922(d). Riverview is also not alleged to have violated any laws or regulations applicable to firearm sales.[3]

B. Plaintiffs' Damages Resulted from the Criminal Misuse of a Lawfully Owned Firearm.

On December 14, 2012, more than two years after Riverview lawfully sold the firearm to Ms. Lanza, her twenty-year-old son, Adam Lanza, retrieved the firearm from the home he shared with his mother and traveled to Sandy Hook Elementary School. A27, ¶154. He entered the school and tragically shot and killed 26 people. A68, ¶2. It is undisputed that Adam Lanza criminally misused the firearm in committing his horrific crimes.

C. Plaintiffs Filed Purported Negligent Entrustment and CUTPA Claims.

Plaintiffs commenced this case on December 13, 2014, nearly two years after the Sandy Hook tragedy and more than three years after the firearm was manufactured by Bushmaster, distributed by Camfour, and sold by Riverview in March 2010. A13-53. Although plaintiffs label their claims as negligent entrustment and CUTPA actions, the allegations they advance are typical of a product liability action. For example, plaintiffs allege that their damages resulted from the use of a product that posed an "unreasonable and egregious risk" of physical injury and was not suitable for "civilian" ownership. A86, ¶213. Plaintiffs complain that the firearm had unreasonably dangerous design features, including the ability to accept

[3] These inferences of statutory compliance by Riverview are drawn from plaintiffs' admission in the trial court that the firearm "was lawfully sold" by Riverview to Nancy Lanza. *See* Appellees' Appendix ("AA") at A78. Plaintiffs have also acknowledged in their brief that the "nature" of their claims is not based on "a careless decision" by a Riverview store clerk. Plaintiffs' Brief ("Br.") at 17-18.

large capacity magazines, rapid fire capability, and high muzzle velocity. A73, ¶57 - A74, ¶74. They further allege that the "risk" posed by the firearm's design characteristics outweighed its "utility" for lawful uses, such as hunting, sport shooting, and self-defense. A86, ¶217. Plaintiffs also complain that Bushmaster marketed the firearm in ways that encouraged persons to use them for criminal purposes. A75, ¶¶79-84. The design characteristics of the firearm and Bushmaster's marketing of the firearm to civilians are alleged to be substantial factors causing plaintiffs' damages. A87, ¶227.

III. ARGUMENT

A. STANDARD OF REVIEW

This Court's review of the sufficiency of plaintiffs' allegations is plenary, as is its review of the trial court's construction of CUTPA and the PLCAA. *J.P. Morgan Chase Bank, N.A. v. Winthrop Props. LLC*, 312 Conn. 662, 670 (2014).

B. THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

The PLCAA protects firearm manufacturers and sellers from litigation involving the criminal misuse of firearms. It does not merely provide defenses to be proven before a jury, as plaintiffs contend. Congress intended to provide manufacturers and sellers with threshold immunity against having to defend themselves *at all* in cases that Congress found to be "without foundation" and an "abuse of the legal system." 15 U.S.C. § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court."). Congress clearly intended to create a bulwark against having to litigate, and this lawsuit—seeking to hold firearm manufacturers and sellers liable for the criminal misuse of a lawfully manufactured, lawfully sold, lawfully possessed, properly functioning firearm—is a paradigm example of the

type of case Congress intended to preempt.[4]

Plaintiffs acknowledge the PLCAA preempts "a broad category of lawsuits arising from the criminal misuse of firearms" and pretend to embrace its application to their allegations. Br. at 31. However, Plaintiffs' interpretation of the PLCAA is demonstrably incorrect under any rule of statutory interpretation. Plaintiffs' interpretation ignores the PLCAA's fundamental purpose to provide threshold immunity against litigation and expands the enumerated exceptions to the point that the exceptions would swallow the rule.

The PLCAA immunizes firearm manufacturers and sellers from "qualified civil liability action[s]," including civil actions for damages resulting from the criminal misuse of a firearm. 15 U.S.C. § 7903(5)(A). Certain causes of action are excluded from the definition of "qualified liability action," and thus are not preempted by the PLCAA. *Id.* § 7903(5)(A)(i)–(v). These enumerated exceptions to PLCAA immunity, however, are not to be construed "to create a public or private cause of action or remedy" for persons harmed by the criminal misuse of firearms. 15 U.S.C. § 7903(5)(C).[5]

C. PLAINTIFFS' NEGLIGENT ENTRUSTMENT ALLEGATIONS ARE LEGALLY INSUFFICIENT.

A negligent entrustment action against a firearm seller is not preempted by the PLCAA. 15 U.S.C. § 7903(5)(A)(ii). Congress defined "negligent entrustment" as:

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[4] The only other Connecticut state court to interpret and apply the PLCAA held that the PLCAA implicates the subject matter jurisdiction of the court and dismissed a plaintiff's multi-count complaint against the retail seller of a firearm subsequently used in a crime. *Gilland v. Sportsmen's Outpost, Inc*., 2011 WL 4509540, at *6 (Conn. Super. Ct. Sept. 15, 2011).

[5] Before the PLCAA was enacted, similar cases against manufacturers of non-defective firearms and ammunition were routinely dismissed by courts based on common law principles, including lack of duty and lack of causation. *See, e.g*., *McCarthy v. Olin Corp*., 119 F.3d 148 (2d Cir. 1997); *Forni v. Ferguson*, 648 N.Y.S. 2d 73 (1st Dep't 1996); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C.1989); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984).

> [T]he supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

15 U.S.C. § 7903(5)(B). Because the PLCAA does not create causes of action, plaintiffs' negligent entrustment allegations must meet the requirements for a negligent entrustment claim under both Connecticut common law ***and*** the statutory definition set forth in the PLCAA.

D. PLAINTIFFS HAVE FAILED TO ALLEGE A NEGLIGENT ENTRUSTMENT ACTION UNDER CONNECTICUT LAW.

The gravamen of plaintiffs' theory is that civilians are unfit to own the firearm used in the shooting, and that plaintiffs' harm was therefore "foreseeable" to defendants not because the person to whom the rifle was sold presented a risk, but simply because the rifle was sold at all. The trial court, after conducting a review of decisions applying negligent entrustment law, rejected plaintiffs' theory because it represented a dramatic extension of the tort insofar as it implied that "the general public lacks the ordinary prudence necessary to handle an object that Congress regards as appropriate for sale to the general public." A157.

1. Plaintiffs Misconstrue the Elements of a Negligent Entrustment Action.

Section 390 of the Restatement (Second) of Torts provides that:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

In their brief, plaintiffs purport to recite the elements of a *prima facie* negligent entrustment case under section 390. Br.at 16. Plaintiffs claim that one of the elements is as follows:

> Knowledge of Unreasonable Risk – the defendant "kn[ew] or ha[d] reason to know" that the entrustment created an "unreasonable risk of physical harm."

Br. at 16. But plaintiffs have omitted critical language from their description of this so-called element. Under section 390, applicable Connecticut law, and the PLCAA definition of negligent entrustment, the question is not whether the defendant "knew or had reason to know" that any aspect of the entrustment created an "unreasonable risk of physical harm." Rather, the relevant question is whether the defendant knew or had reason to know that *the person to whom the chattel was entrusted* was "likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm." Restatement (Second) of Torts § 390; *see also Greeley v. Cunningham*, 116 Conn. 515, 165 A. 678, 679 (1933) (holding that evidence must show that an entrustor "knows or ought reasonably to know" that the entrustee is incompetent for an injured party to have a basis of recovery); 15 U.S.C. § 7903(5)(B). The knowledge inquiry is not focused on a defendant's awareness of the dangerousness of the object, but on the specific entrustee's propensity to use a potentially dangerous object in a manner involving unreasonable risk of harm. Accordingly, the trial court correctly observed that the second element of a negligent entrustment claim is only satisfied where the entrustor has "actual or constructive knowledge that ***the*** entrustee is incompetent or has a dangerous propensity." A145 (emphasis added).[6]

This conclusion is entirely consistent with the existing body of negligent entrustment law in Connecticut. *See Turner v. American Dist. Tel. & Messenger Co*., 94 Conn. 707, 110 A. 540, 543 (1920) (finding that defendant's knowledge of an entrustee's competence to handle a firearm safely is a "vitally important" element of the claim); *Beale v. Martins*, 2015 WL 9598388, at *2 (Conn. Super. Ct. Dec. 1, 2015) (requiring the entrustor to have "actual

[6] The PLCAA recognizes this basic premise and provides that negligent entrustment actions are only available against statutorily-defined firearm "sellers," not remote manufacturers. 15 U.S.C. § 7903(5)(A)(ii).

or constructive knowledge" about the entrustee's incompetence); *Davis v. Elrac, LLC*, 2014 WL 5394924, at *16 (Conn. Super. Ct. Sept. 26, 2014) (collecting cases).[7] Indeed, plaintiffs have not cited a single case in which the specific entrustee's competence to handle the product safely was not central to the court's analysis of a negligent entrustment claim.

The reason for plaintiffs' obfuscation regarding the knowledge element is obvious. They have not pleaded that any of the defendants had reason to know that Nancy Lanza, the person to "whom" Riverview entrusted the firearm, was likely to use it in a manner involving unreasonable risk of physical injury. Indeed, plaintiffs admit their case is not about a "decision by a Riverview Sales store clerk" (Br. at 17-18), essentially conceding they have not pleaded a true negligent entrustment action.

In an attempt to sidestep the trial court's determination that "the dispositive issue is whether the entrustor knows or should know of the direct entrustee's incompetence" (A152), plaintiffs have resorted to sensationalist rhetoric regarding the alleged dangers of the firearm (Br. at 14, 21-22), the alleged "foreseeability" that it would be criminally misused no matter who purchased it (*id*. at 17-19 & 26), the alleged unreasonableness of defendants' conduct (*id.* at 4, 13, 14, 21, 24 & 27), and defendants' alleged duty to act "prudently." *Id*. at 15. These allegations are clearly inspired by the objective "reasonable care" standard applicable to ordinary negligence claims. *See, e.g., Jaramillo v. Case*, 100 Conn. App. 815, 824-25 (2007) (holding that reasonableness is an objective standard involving an analysis of what a person

[7] This Court has also interpreted the "knows or has reason to know" standard as requiring "actual or constructive knowledge" in other contexts. *See, e.g., Maffucci v. Royal Park Ltd. P'ship*, 243 Conn. 552, 559-60 (1998) (land owner had no "duty to anticipate" trespassers under "actual or constructive knowledge" standard); *Prato v. City of New Haven*, 246 Conn. 638, 643 (1998) ("[T]he predictability" of a future event is insufficient to prove a municipality's notice of a highway defect).

with ordinary prudence would do given the circumstances). But the tort of negligent entrustment is distinct from the tort of ordinary negligence,[8] as plaintiffs have acknowledged, Br. at 28, so the two theories of liability cannot be conflated.

Negligent entrustment liability is premised on a subjective standard—whether an entrustor had actual or constructive knowledge of the entrustee's incompetence or planned misuse of a chattel. In contrast, a defendant accused of ordinary negligence can be saddled with a broader duty of care based on objective notions of "foreseeable" harm. *Lawrence v. O&G Indus., Inc.*, 319 Conn. 641, 649-50 (2015) (noting that "[t]he ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised" and entails "a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result").[9] Accordingly, plaintiffs' reliance on

[8] Plaintiffs' characterization of their allegations as negligent entrustment claims, as opposed to ordinary negligence claims, is not accidental. In enacting the PLCAA, "Congress consciously considered how to treat tort claims" and it "chose generally to preempt all common-law claims," except negligent entrustment and negligence per se. *Ileto v. Glock, Inc*., 565 F.3d 1126, 1135 n.6 (9th Cir. 2009). There is no ordinary negligence exception to PLCAA immunity. 15 U.S.C. § 7903(5)(A); *see Delana v. CED Sales, Inc*., 486 S.W.3d 316, 321-22 (Mo. 2016) (reiterating that the PLCAA expressly preempts all general negligence actions seeking damages resulting from the criminal or unlawful use of a firearm.); *In re Estate of Kim ex rel Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) ("The statutory exceptions do not include general negligence, and reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplusage."); *Jefferies v. District of Columbia*, 916 F.Supp.2d 42, 46 (D.D.C. 2013) (PLCAA "unequivocally" barred plaintiff's negligence claim against the manufacturer of an "assault weapon."); G*illand v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *15-16 (Conn. Super. Ct. May 26, 2011) (PLCAA does not permit common law negligence claims to proceed).

[9] Other courts have recognized, in the context of firearm sales, that the "reason to know" standard "does not simulate the common law duty of care." *Knight v. Wal-Mart Stores*, *Inc*. 889 F. Supp. 1532, 1536, 1539 (S.D. Ga. 1995). For a firearm seller to have a "reasonable cause to believe" a person was a prohibited firearms purchaser, the seller must have "knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, to conclude that the other person was in fact"

Shirley v. Glass, 297 Kan. 888 (2013), in which "the degree of harm that . . . an object likely poses" was found relevant only as to whether the defendant had failed to exercise "reasonable care" in an ordinary negligence action, is misplaced. *Id*. at 900.

A similar attempt to "inject the duty of 'reasonable care' into the law of negligent entrustment" was rejected by the court in *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1226 (D. Colo. 2015). In dismissing a negligent entrustment action against the sellers of ammunition used in the shooting at an Aurora, Colorado theatre, the court correctly observed that "the standard for negligent entrustment liability is narrower than the ordinary negligence standard because the manner in which the chattel is ultimately used is outside the supplier's control." *Id*. The attenuated connection between the entrustment and the entrustee's act directly resulting in harm "is the very reason why suppliers of chattel are required to act only on their actual knowledge or facts from which knowledge may be reasonably inferred." *Id*.[10]

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a prohibited purchaser. *United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1313 (M.D. Fla.), ***aff'd***, 362 F. Supp. 2d 1323 (M.D. Fla. 2005). The standard requires the defendant's knowledge "to be evaluated through the lens of the particular defendant, rather than from the perspective of a hypothetical reasonable man." *United States v. Munguia*, 704 F.3d 596, 603 (9th Cir. 2012). The "reasonable cause to believe" standard "when used for civil liability, is more favorable to [defendants] than the common law negligence standard." *Knight*, 889 F. Supp. at 1536-37.

[10] Amicus Curiae Professors also conflate tort doctrines and principles, and argue for a radical expansion of negligent entrustment liability for the purpose of "endorsing plaintiffs' cause of action." Br. of Amicus Curiae Professors at 1. In their view, established "prerequisites" to negligent entrustment liability are "fussy demands" that should be jettisoned in favor of a "flexible" doctrine wherein an entrustor need not have any actual or constructive knowledge of an entrustee's incompetence. *Id*. at 2. They believe it is enough that the entrustor "paves the way" for a "reckless individual" to cause harm. *Id*. at 3. The Professors' theory presents numerous problems, foremost of which is that it ignores Connecticut common law and this Court's obligation to apply the PLCAA definition of "negligent entrustment," which requires the seller's actual or constructive knowledge that "the person to whom the product is supplied is likely to, and does, use the product" to cause a risk of injury. 15 U.S.C. § 7903(5)(B). Despite the Professors' assertion that there is support for their theory, a close reading of the cases they cite compels the opposite conclusion—knowledge of the competence of persons entrusted with products to use them safely is always central

2. Defendants Did Not Negligently Entrust the Firearm When They Made it Available to the General Public.

Recognizing that they cannot allege that any of the defendants had the requisite knowledge of either Nancy Lanza's or her son's dangerous propensities or intent to misuse the firearm, plaintiffs allege that civilians as a class of persons are unfit to use or possess a firearm of this type. A69-107 at ¶¶ 9, 11, 93, 144-166, 171-172, 213-214, and 223-224. The trial court, recognizing that plaintiffs' theory rested on "labeling as a misuse the sale of a legal product to a population that is lawfully entitled to purchase such a product," properly refused to stretch the theory of negligent entrustment to encompass plaintiffs' claims. A157.

The fundamental defect in plaintiffs' theory was recognized in *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997). In that case, victims of the mass shooting on the Long Island Railroad filed suit against the manufacturer of the ammunition used by the shooter, alleging, similar to what the plaintiffs allege here, that the ammunition had "severe wounding power" and was negligently marketed because defendant's advertising highlighted the "ripping and tearing characteristics" of the ammunition, and attracted "sadistic, unstable" people. 119 F.3d at 156. The plaintiffs argued before the district court that the sale of the ammunition to the general public constituted negligent entrustment. *McCarthy v. Sturm, Ruger* & Co., 916 F. Supp. 366, 370 (S.D. N.Y. 1996). The district court rejected the plaintiffs' argument, noting

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to the analysis. *See Short, supra* (plaintiff alleged that entrustor knew that college student intended to operate truck in a pedestrian-dense, alcohol-rich environment); *Rios v. Smith*, 95 N.Y.2d 647, 653 (2001) (father knew that son had driven the ATV recklessly and that son's friend had driven the ATV with the son on prior occasions); *Collins v. Arkansas Cement Co.,* 453 F.2d 512, 515 (8th Cir. 1972) (owner of cherry bombs "knew or had reason to know" of the specific entrustee's "incompetence"). Amici Curiae Brady Center, Connecticut Association of Public School Superintendents ("CAPSS") and Newtown Action Alliance ("NAA") advocate for the same radical expansion of negligent entrustment liability (Br. of Amicus Curiae Brady Center at 4-10; Br. of Amice Curiae NAA & CAPSS at 1, 9-10), and their arguments should be rejected for the same reasons.

that negligent entrustments are made to persons who lack ordinary prudence. *Id*. The court reasoned that "[t]o extend this theory to the general public would be a dramatic change" in tort law. *Id*. The court held that recognizing a "negligent entrustment rule for the protection of the general public" would "imply that the general public lacks ordinary prudence and thus undermine the reasonable person concept so central to tort law." *Id*; *see also Adeyinka v. Yankee Fiber Control, Inc*., 564 F. Supp. 2d 265, 287 (S.D.N.Y. 2008) (negligent entrustment defendant did not owe a duty to the "general public" to ensure that only "experienced" persons handled a "potentially dangerous product").[11]

Plaintiffs rely on a number of inapposite decisions in an attempt to shore up their theory. For instance, plaintiffs cite *Short v. Ross*, 2013 WL 1111820 (Conn. Super. Ct. Feb. 26, 2013), for the proposition that "objects pose varying degrees of risk in different contexts." Br. at 22. While defendants do not dispute this truism, *Short* does not support plaintiffs' argument that the alleged unsuitability of a firearm for civilian use can alone be the basis for negligent entrustment liability. The plaintiff in *Short* alleged that defendant U-Haul rented a truck to a person when it "knew of that individual's purpose to operate the vehicle in a pedestrian-dense, unregulated and alcohol-rich environment." 2013 WL 1111820, at *3. Thus, the plaintiff's negligent entrustment claim was based on the entrustor's alleged knowledge of the specific entrustee's proposed use of the truck, not simply on defendant's

[11] Plaintiffs' attempt to distinguish *McCarthy* falls substantially short. Br. at 27-29. First, although the plaintiffs in *McCarthy* asserted a negligence claim, they argued that defendant's conduct was a negligent entrustment under Restatement § 390. 916 F. Supp. at 370. The court rejected plaintiffs' argument and explained why a negligent entrustment to the "general public" theory was antithetical to basic tort law*. Id*. Second, whether foreseeability is part of the duty formulation in a negligence case is immaterial because plaintiffs here have not and cannot plead ordinary negligence claims against the defendants. Third, that *McCarthy* was decided 20 years ago is a meaningless distinction. Plaintiffs have not pointed to any subsequent case that diminishes the force of the court's reasoning.

general knowledge that trucks might be used in such environments, or that they are inherently dangerous when driven by the general public. *Id*. at *4.

Collins v. Arkansas Cement Co. is also unhelpful to plaintiffs. In that case, the court held there was sufficient evidence under Arkansas law that the owner "knew or had reason to know" of the specific entrustee's "incompetence" to sustain the jury's verdict. 453 F.2d at 515. The supplier's knowledge of the entrustee's incompetence was the key to the court's decision, not simply that dangerous objects—cherry bombs—were entrusted. The court reached the same conclusion in *Fredericks v. General Motors Corp*., 48 Mich. App. 580 (1973), a case also relied upon by plaintiffs. *Id.* at 585 (holding that "the theory of negligent entrustment does not hinge on the nature of the chattel, but on the supply of the chattel to a probable negligent user").

Having been rebuffed by the trial court, plaintiffs have retreated to a different theory on appeal. Plaintiffs now argue that the defendants' alleged negligent entrustment was not to a class comprising all civilians, but to a similarly broad and undefined class of a "younger demographic of users." Br. at 14, 20, 21, 24, 27 and 37. As an initial matter, plaintiffs' new theory has neither been pleaded nor raised in the trial court. The only mention of a "younger demographic of users" in the First Amended Complaint is this: Bushmaster acknowledged "in public filings that the growth of the AR-15 market was due to its appeal to a 'younger demographic of users.'" A82, ¶175. This statement cannot be read to imply that Bushmaster purposefully marketed the firearms to "younger" firearm purchasers. Rather, it is an appraisal of the market for these firearms generally, in which other manufacturers also participate.[12]

[12] Plaintiffs provide a quote from the public filing but they do so incompletely and without context. Br. at 1. The complete statement is in the Appendix. A407.

The second problem with plaintiffs' new theory is that, even if Bushmaster did target "younger" firearm purchasers through its marketing efforts, so-called "younger" firearm owners cannot be a presumptive class of persons to whom firearms should not be entrusted. Congress and the General Assembly have already determined the ages at which persons are mature enough as a general matter to possess and handle firearms.[13] Plaintiffs do not cite any case in which product advertisements directed at adult persons who were lawfully entitled to purchase the product were held to be the basis for tort liability. Regardless, product advertisements are not actionable under any theory of liability unless they contain representations of fact that are fraudulent or untrue.[14] Even more fundamentally, the PLCAA does not have an exception to immunity based on a firearm manufacturer's alleged "negligent marketing practices." Plaintiffs' marketing claims are prohibited on that basis alone.

The third problem with plaintiffs' new theory is that the firearm was not purchased by

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[13] Under federal law, persons must be at least 18-years old to purchase shotguns and rifles. 18 U.S.C. § 922(b)(1). In Connecticut, persons who are 18-years old and older are eligible to purchase shotguns and rifles. Gen. Stat. § 29-37a(b)(1); s*ee Dwyer v. Farrell*, 193 Conn. 7, 12 (1984) (General Statutes §§ 29-28 through 29-38 reflect the legislature's role in protecting "the safety of the general public from individuals whose conduct has shown them to be lacking the essential character or temperament necessary to be entrusted with a weapon.").

[14] *See generally Gold v. Univ. of Bridgeport Sch. of Law*, 19 Conn. App. 379 (1989); *Davies v. General Tours, Inc*., 63 Conn. App. 17 (2001). Moreover, advertisements intended to interest legally entitled adults—young or old—in purchasing products are not actionable even if the advertising is "exaggerated, blustering and boasting." *Time Warner Cable, Inc. v. Direc TV, Inc*., 497 F.3d 144, 159-60 (2d Cir. 2007) (subjective claims about products that cannot be proven either true or false are "puffery" on which reasonable buyers are not justified in relying); *New Colt Holding Corp. v. RJG Holdings of Florida*, *Inc.*, 312 F. Supp. 2d 195, 235 (D. Conn. 2004) (statement that a firearm was the "gun that won the west" held to be non-actionable puffing). Indeed, product promotional efforts are protected under the First Amendment to the U.S. Constitution. *See Wilson v. Midway Games, Inc*., 198 F.Supp.2d 167, 179-82 (D. Conn. 2002) (negligence claim in wrongful death case against video game maker based on game's violent images and messages dismissed on First Amendment grounds because they were "not directed to inciting or producing imminent lawless action and likely to incite or produce such action.").

a person in the "class" plaintiffs now cast as incompetent. The firearm was purchased by an adult woman, who was old enough to be the mother of a 20-year old man. Thus, even if plaintiffs had sufficiently alleged that Bushmaster targeted a "younger demographic of users" through its marketing efforts, and such a vaguely defined class of persons were found to be a presumptively incompetent class of firearm owners, plaintiffs' theory fails as a factual matter because this firearm was not purchased by a member of that demographic group.[15]

At bottom, plaintiffs' new theory is the same as their old theory: a class of adults allegedly constitutes a category of persons who should not be trusted to own a type of firearm because its dangers are allegedly too great. This new class ("young" adult civilians) may be smaller than the old class (all adult civilians), but it is vaguely defined and still cuts too broadly and anonymously across lawful adult firearm purchasers of legal firearms.[16]

3. Plaintiffs' Reliance on the Michigan Supreme Court's decision in *Moning* is Misplaced.

Plaintiffs rely heavily on the Michigan Supreme Court's decision in *Moning v. Alfono,* 400 Mich. 425 (1977), for the proposition that a product manufacturer can be liable for

[15] An additional problem with plaintiffs' new theory is that it is unworkable. Who among lawful firearm purchasers are the "younger demographic of users?" Are 25-year old persons? Are 30-year old persons? If a highly competent, safety conscious 18-year old person lawfully purchased a rifle that is later used by someone else to commit a crime, did the seller negligently entrust the firearm simply because the purchaser was 18-years old? These questions can only be answered based on the seller's alleged knowledge of the specific purchaser's competence, an essential element of a negligent entrustment action that plaintiffs have not pleaded.

[16] Courts have recognized that children may not understand the dangers of certain products. But even in negligent entrustment cases involving children, the competence of the specific child is determinative of whether there has been a negligent entrustment. *See Greeley,* 165 A. at 679 (holding that "something more" is required to fix liability than "mere proof" that the entrustee of an automobile was "unlicensed and inexperienced"); *Burbee v. McFarland*, 114 Conn. 56 (1931) (jury was properly charged that there is not a conclusive presumption that a minor was incapable of understanding dangers of fireworks).

negligently entrusting its products by simply placing them into the stream of commerce and marketing them to lawful purchasers. Br. at 21 ("*Moning* is a framework for understanding plaintiffs' claims."). *Moning* is not helpful to plaintiffs' position.

Plaintiffs incorrectly characterize *Moning* as a negligent entrustment case. Br. at 18. Although the court discussed the "doctrine of negligent entrustment" along with the "attractive nuisance doctrine," the plaintiff's "claim [was] grounded in negligence," and the defendant manufacturer's conduct in marketing sling shots directly to children was evaluated under the duty of reasonable care. 400 Mich. at 443, 445. The court in *Moning* held that whether the defendant was negligent in creating an unreasonable risk of harm by marketing its products directly to children was to be determined by a jury under a risk-utility analysis. *Id*. at 450-52. The Michigan Supreme Court subsequently limited the reach of *Moning* to marketing practices directed at children. *Halbrook v. Honda Motor Co.*, 224 Mich. App. 437, 445-46 (1997) (citing *Buczkowski v. McKay*, 441 Mich. 96, 103 n.8 (1992)). This case does not involve marketing practices directed at children.[17]

Soon after *Moning* was decided, courts across the country encountered plaintiffs relying on *Moning* in cases brought against manufacturers of small handguns, alleged to be "Saturday Night Specials."[18] The plaintiffs sought recovery of damages caused by the

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[17] The Michigan Appellate Court's decision in *Halbrook, supra,* is instructive because the plaintiffs' allegations against the defendant motorcycle manufacturer were virtually identical to plaintiffs' allegations in this case. In *Halbrook*, the plaintiff alleged that the defendant "deliberately marketed the motorcycle to young male riders with special emphasis on speed." *Id*. at 440. Plaintiffs argued that the 26-year old licensed driver of the motorcycle was "an impressionable young man" who "was enticed into breaking the law by defendant's advertisement" that encouraged him to drive fast. *Id* at 445. The court, however, held that the speed and fast acceleration depicted in the advertisements "were mostly puffing" and there was "no duty for an advertiser to change its advertising pitch" simply because "the target adult audience might be swayed" by it. *Id*. at 446.

[18] *See, e.g.*, *King v. R.G. Indus., Inc.*, 182 Mich. App. 343 (1990); *Linton v. Smith & Wesson*,

criminal misuse of these firearms, and alleged that manufacturers were liable under various theories, including ordinary negligence, strict liability, and liability for ultra-hazardous activity and ultra-hazardous products. As in this case, the firearms at issue functioned as designed, but, according to the plaintiffs, they were preferred by criminals, were inappropriate for legitimate uses such as hunting and target shooting, and should not have been sold to the general public. Appellate courts resoundingly rejected this theory of liability.[19] *Moning* has only limited application under Michigan law, and it has no application here.

E. PLAINTIFFS' ALLEGATIONS DO NOT SATISFY THE PLCAA DEFINITION OF A NEGLIGENT ENTRUSTMENT ACTION.

Even if plaintiffs had pleaded a negligent entrustment action under Connecticut law, their claim still fails because they do not allege facts satisfying the PLCAA definition of "negligent entrustment." The PLCAA definition of "negligent entrustment" is the floor in a case against a seller involving the sale of a criminally misused firearm, and that definition, not state law, is the definition that controls the inquiry into whether the action is barred by the PLCAA. Accordingly, a claim that fails to state facts sufficient to satisfy the PLCAA definition of negligent entrustment has failed to remove the cause of action from the definition of a "qualified civil liability action," and the claim is preempted by the PLCAA. 15 U.S.C.

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127 Ill. App.3d 676 (1984); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Delahanty v. Hinckley*, 845 F.2d 1069 (D.C. Cir.1988), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990).

[19] *See, e.g.*, *Martin v. Harrington & Richardson, Inc*., 743 F.2d 1200 (7th Cir. 1984); *Perkins v. F.I.E. Corp*., 762 F.2d 1250 (5th Cir. 1985); *Riordan v. Int. Armament Corp*., 132 Ill. App. 3d 642 (1985); *Trespalacios v. Valor Corp*., 486 So. 2d 649 (Fla. Dist. Ct. App. 1986); *Moore v. R.G. Indus., Inc*., 789 F.2d 1326 (9th Cir. 1986); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Knott v. Liberty Jewelry & Loan*, *Inc*., 50 Wash. App. 267 (1988); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Delahanty,* 564 A.2d 758; *First Commercial Tr. Co. v. Lorcin Eng'g*, *Inc*. 321 Ark. 210 (1995); *Merrill v. Navegar, Inc*., 26 Cal. 4th 465 (2001).

§7903(5)(A). Plaintiffs agree that the PLCAA definition of negligent entrustment is the "threshold inquiry." Br. at 29. [20]

1. A Firearm "Use" Should Be Defined to Preserve the PLCAA's Purpose.

To state a negligent entrustment claim meeting the PLCAA definition of "negligent entrustment," plaintiffs must allege that "the seller knows or reasonably should have known that the person to whom the product is supplied is likely to, and does, ***use*** the product in a manner involving unreasonable risk of physical injury to the person or others." 15 U.S.C. § 7903(5)(B) (emphasis added). This clear statutory text forecloses plaintiffs' claims for two reasons: first, because plaintiffs have not alleged that any defendant "knew or reasonably should have known" that the *specific* person to whom the firearm was sold, *i.e*., Nancy Lanza, was likely to misuse it; and second, because Nancy Lanza was not the person who "use[d] the product in a manner involving unreasonable risk of physical injury."

Plaintiffs carefully avoid discussing what conduct by Nancy Lanza—the person to whom the firearm was supplied—constituted her "use" of the firearm. *See* Br. at 32-36. That's because no such conduct exists. Implicitly recognizing that fact, plaintiffs instead argue that focusing on Nancy Lanza's conduct is unnecessary because a "use" of a firearm under the PLCAA definition of negligent entrustment includes a federally-licensed seller merely offering a firearm "for sale" and receiving payment. Br. at 36. Plaintiffs' argument cannot be reconciled with the plain text of the statute. A supplier's sale of a product is plainly not a "use" by the

[20] *Cf*. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (federal preemptive statute established a minimum standard, *i.e*., a "floor"); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (preemption clause of the Food, Drug and Cosmetic Act relating to medical devices, 21 U.S.C. § 360k(a), preempts certain state law claims: "Petitioner's common-law claims are pre-empted because they are based upon New York 'requirement[s]' with respect to Medtronic's catheter that are 'different from, or in addition to' the federal ones, and that relate to safety and effectiveness, § 360k(a).").

person to whom the product is supplied.

Plaintiffs' argument should also be rejected because it is in conflict with the PLCAA's purpose and it yields an absurd result. Interpretation of firearm "use" to include lawful sales of legal firearms among federally-licensed manufacturers, wholesalers, and retail dealers cannot be reconciled with the PLCAA's purpose—to protect licensed firearm manufacturers and sellers from lawsuits arising from the criminal use of firearms. Under plaintiffs' interpretation of "use," firearm manufacturers and sellers would face limitless negligent entrustment liability, because each transfer of a firearm along this federally-licensed lawful chain of commerce would be tortious.

Instead of addressing the problems with their theory, plaintiffs set up a straw man, and devote the entirety of their argument to knocking it down. Plaintiffs' straw man is the assertion that defendants "argued" in the trial court that a firearm "use" refers "exclusively to discharging it to cause harm." Br. at 32. Defendants did not argue for that interpretation. As the trial court noted, "defendants argue[d]" that a "use" must be something "beyond the mere selling of a firearm." A163-64. Otherwise, defendants argued, every firearm transferred "through legal commerce" has been put to an actionable "use" by its manufacturer, wholesale distributor and retail seller. AA at A17. Again, that result is impossible to reconcile with the PLCAA's core purpose.

Plaintiffs' reliance on the Supreme Court's interpretation of "use" under 18 U.S.C. § 924(c)(1)(A) in *Smith v. United States*, 508 U.S. 223 (1993), is misplaced. Section 924(c)(1)(A) calls for enhanced punishment when a person "uses or carries" a firearm "in relation to any crime of violence or drug trafficking crime." In *Smith*, the defendant was found to have "used" a firearm under section 924(c)(1)(A) when he traded a firearm for drugs. 508

U.S. at 226. Plaintiffs argue that the definition of "use" arrived at in *Smith* should be adopted by this Court.

Plaintiffs ignore the principle that the same language in different statutes may be construed together only when the statutes are *in pari materia*. *Firstar Bank, N.A. v. Faul*, 253 F. 3d 982, 990 (7th Cir. 2001) (statutes are *in pari materia* when their purposes and subjects are similar); *Lieberman v. FTC*, 771 F.2d 32, 40 (2d Cir. 1985) (even same term within different version of same statute is not *in pari materia* where goals of the statute changed). Section 924(c)(1)(A) is a federal criminal statute that provides for enhanced punishment of persons convicted of carrying or using a firearm "during and in relation to any crime of violence or drug trafficking crime." In contrast, the PLCAA is a federal statute involving trade and commerce, providing immunity from litigation to firearm manufacturers and sellers. The statutes have entirely different subjects and purposes and are not *in pari materia*.

Plaintiffs also disregard *Bailey v. United States*, 516 U.S. 137 (1995), a subsequent Supreme Court decision addressing the meaning of "use" under section 924(c)(1)(A), where the Court held that although a "use" under section 924(c)(1)(A) can include "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm," a defendant cannot be charged for merely storing a firearm near drugs. *Id*. at 148. "Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession." *Id*. at 149. *Bailey* establishes that one does not "use" a firearm without actively employing it. *See United States v. Regans*, 125 F.3d 685, 686 n.2 (8th Cir. 1997) (recognizing that *Bailey* overruled *Smith*'s expansive interpretation of a firearm "use" under 18 U.S.C. § 924(c)(1)(A)).

Thus, even if the PLCAA were *in pari materia* with section 924(c)(1), and the *Bailey*

Court's definition of "use" for purposes of section 924(c)(1)(A) were adopted as the definition of "use" in the PLCAA negligent entrustment definition, Nancy Lanza did not "use" the firearm by merely purchasing it and storing it in her home. For the same reasons, Bushmaster did not "use" the firearm by selling it to Camfour; Camfour did not "use" the firearm by selling it to Riverview; and Riverview did not "use" the firearm by selling it to Ms. Lanza.

2. Courts Should Defer to the Legislature regarding Firearms Policy.

When confronted with the theory of liability that plaintiffs advance in this case—that the alleged risks posed by a type of firearm outweigh its utility for lawful uses—courts have consistently relied on the principle of judicial deference to the legislative prerogative in matters relating to firearms. *See, e.g.*, *Caveny*, 665 F. Supp. at 534 ("[W]e do not see this as a matter the courts should decide on a case-by-case basis."); *Patterson*, 608 F. Supp. at 1206 (This "unconventional theory" would result in gun control "on an ad hoc basis by six or twelve jurors sitting in judgment on a single case.").[21]

Individual court decisions—whether by judge or jury—are made on the basis of factual records unique to each case, and depend on testimony from different witnesses and arguments, and strategies of different attorneys. The quality of the evidence in any given case may differ dramatically, and judges and juries evaluate evidence by applying their own values and prejudices that may not reflect those of the majority of citizens. As a result, court

[21] *See also City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 384 (2004) ("[T]here are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms."); *People ex rel Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S. 2d 192, 203 (1st Dep't 2003) ("As for those societal problems associated with…legal handgun manufacturing and marketing, their resolution is best left to the Legislative and Executive branches."); *In re Firearms Cases*, 126 Cal. App. 4th 959, 985 (2005) ("While plaintiffs' attempt to add another layer of oversight to a highly regulated industry may represent a desirable goal…[e]stablishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation.").

decisions "will necessarily be inconsistent" across judicial districts. *Patterson*, 608 F. Supp. at 1206. Inconsistent application of the law in the courts will not provide guidance to firearm manufacturers and sellers seeking to comply with the law. A poorly reasoned court decision will remain the law until a similar case comes along and a different ruling is made.

In contrast, legislatures are able flexibly to "consider all of the competing policy interests and the public will." *Caveny*, 665 F. Supp. at 534. Legislatures are not limited in their decision-making to evidence presented to them in a "record" but can, and do, gather relevant information and perform research deemed necessary. As a result, legislatures are able to enact laws that are uniformly applied, and they have institutional flexibility to amend or repeal them, if necessary. And, perhaps most important, a legislative decision reflects, in theory, what the majority of citizens believe the law should be, which is particularly important in policy areas on which the public is divided. Firearms policy is one such area, and it is firmly established that "[i]n the context of firearms regulation, the legislature is 'far better equipped than the judiciary' to make sensitive policy judgments (within constitutional limits) concerning the dangers" of firearms." *State v. DeCiccio*, 315 Conn. 79, 144 (2014).

Preserving the legislatures' role regarding firearms policy was among the purposes of the PLCAA: "[t]o preserve and protect the Separation of Powers doctrine" found in the U.S. Constitution. 15 U.S.C. § 7901(b)(6). Congress deemed the PLCAA necessary because "liability actions" were seen as "attempt[s] to use the judicial branch to circumvent the Legislative branch of government." 15 U.S.C. § 7901(a)(8). The separation of powers doctrine is also firmly embedded in Connecticut law and the Connecticut Constitution.[22]

[22] CONN. CONST., Article II; *Kelley Prop. Dev., Inc. v. Town of Lebanon*, 226 Conn. 314, 339-340 (1993) (separation of powers requires judicial deference to legislative resolution of conflicting considerations of public policy).

The role of legislatures in regulating firearms at all levels of government cannot be overstated.[23] For the purpose of this case, the General Assembly acted to prohibit the possession of certain firearms in 1993. Gen. Stat. § 53-202a (1993). The General Assembly acted again in 2001 and added additional firearms to the list of banned firearms. Gen. Stat. § 53-202a (2001). And again in 2013, in direct response to the shooting at Sandy Hook Elementary School, the General Assembly acted and prohibited the possession of even more firearms, including the firearm involved in this case. Gen. Stat. § 53-202a (2013). These actions by the General Assembly set Connecticut policy concerning the sale and civilian possession of semi-automatic rifles in the state.[24]

The firearm Riverview sold to Nancy Lanza was not among the firearms banned by the General Assembly in March 2010, and was therefore lawful to sell and possess. *See McCarthy*, 119 F.3d at 157 (judicial deference to the legislature appropriate because ammunition had not been legislatively "proscribed"). Imposition of legal liability on those who simply manufactured and lawfully sold legally owned firearms that were later used in crimes

[23] *See, e.g.*, 18 U.S.C. § 921 *et seq*. (Gun Control Act of 1968), and regulations promulgated thereunder, 27 CFR Part 478 (Commerce in Firearms and Ammunition); 26 U.S.C. § 5801 *et seq*. (National Firearms Act) and regulations promulgated thereunder, 27 CFR Part 479 (Machine Guns, Destructive Devices and Certain Other Firearms); and 28 CFR Part 25 (National Instant Criminal Background Check System); Gen. Stat. § 29-28 *et seq*. (permit for sale at retail of pistol or revolver); Gen. Stat. § 29-33 (sale, delivery or transfer of pistols and revolvers); Gen. Stat. § 29-37a (sale or delivery at retail of firearm other than pistol or revolver); Gen. Stat. § 29-37b (retail dealer to equip firearms with locking device at time of sale and warn of consequence of unlawful storage); Gen. Stat. § 53-202a (permitted rifle, shotgun and pistol designs); Gen. Stat. § 53-202b (sale or transfer of assault weapons); Gen. Stat. § 53-202c (possession of assault weapons); Gen. Stat. § 53-202d (certification of possession of assault weapons); Gen. Stat. § 53-202f (transportation of assault weapons).

[24] The 2013 amendments to § 53-202a did not retroactively make prior sales and possession of now-prohibited firearms illegal. Indeed, the amendments expressly provided that it was lawful to possess such firearms if they were actually or constructively possessed on or before April 4, 2013. Gen. Stat. § 53-202a(7) and § 53-202c(d).

would circumvent Connecticut law and policy and lead to "limitless liability." *Id.* at 157; *see also Martin*, 743 F.2d at 1204 ("Imposing liability for the sale of handguns . . . would produce a handgun ban by judicial fiat."). A court judgment based on the plaintiffs' allegation that the firearm was too dangerous to sell to the general public would be an improper judgment on the legitimacy of Connecticut policy itself, as established by the General Assembly.

F. JUDGMENT ON PLAINTIFFS' CUTPA CLAIMS SHOULD BE AFFIRMED.

The trial court's judgment on plaintiffs' CUTPA claims should be affirmed because plaintiffs lack standing to bring CUTPA actions. In addition, there are alternative grounds on which to affirm the trial court's judgment on plaintiffs' CUTPA claims. They are: (1) the court does not have subject matter jurisdiction over plaintiffs' claims because they were not filed within three years of defendants' alleged CUTPA violations; (2) plaintiffs' CUTPA claims are barred by the exclusivity provision in the CPLA; (3) wrongful death damages are not recoverable under CUTPA; and (4) an alleged violation of CUTPA cannot serve as an exception to the immunity for firearm manufacturers and sellers under the PLCAA.

1. Plaintiffs Do Not Have Standing under CUTPA.

CUTPA was enacted to protect consumers and other business persons from unfair or deceptive trade practices in the marketplace. It was intended by the legislature to apply to business transactions involving the parties. Conn. Joint Standing Committee Hearings, General Law, Pt. 1 1978 Sess., at 307-308. CUTPA's purpose is to give consumers and business persons "great protection against deceptive or unscrupulous businessmen who by unfair methods of competition and deceptive advertising…unlawfully divert trade away from law abiding businessmen" and "who won't play fair." *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 497 (1995).

Plaintiffs do not allege they are consumers of defendants' products, defendants'

business competitors, or in commercial relationships with defendants. They argue, however, that despite CUTPA's clear purpose to protect persons in the marketplace, a person "need only allege an injury resulting from prohibited conduct to establish CUTPA standing." Br. at 38. Plaintiffs' argument ignores years of jurisprudence interpreting CUTPA to protect consumers, business competitors, and others in commercial relationships with a defendant who has harmed them in a marketplace transaction. Plaintiffs' claim to standing, if accepted, would expand CUTPA's reach in ways that the legislature did not contemplate and that this Court has not countenanced.

i. Plaintiffs Are Not in the Zone of Interest CUTPA Protects.

CUTPA standing, like standing to assert any statutory cause of action, implicates the concept of statutory aggrievement, which "exists by legislative fiat, not by judicial analysis of the particular facts of the case." *Windels v. Envt'l. Prot. Comm'n*, 284 Conn. 268, 270 (2007). It exists when the interest sought to be protected is "within the zone of interests to be protected by the statute in question." *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning and Zoning Comm'n*, 285 Conn. 381, 393 (2008). This Court has recognized certain constituencies as being within the zone of interest protected by CUTPA, namely consumers and other business people harmed by unfair behavior and competition in the marketplace. *See, e.g., Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 643 (2002).

Consistent with CUTPA's purpose to protect persons in marketplace transactions, this Court has interpreted CUTPA to give standing to business competitors and other business persons. *McLaughlin Ford, Inc. v. Ford Motor Co*., 192 Conn. 558 (1984). This Court has had subsequent opportunities to further expand CUTPA's reach beyond consumers, competitors, and others in commercial relationships with defendants, but has not done so. *See Vacco v. Microsoft Corp*., 260 Conn. 59, 87 (2002); *Ventres v. Goodspeed Airport*, *Inc*., 275 Conn.

105, 157-58 (2005). Connecticut courts have relied on this Court's decisions and universally held that standing under CUTPA is limited to persons in these three categories who have sustained direct ascertainable losses of money or property in trade or commerce. *See, e.g., Pinette v. McLaughlin*, 96 Conn. App. 769, 777 (2006). This Court recognizes that, CUTPA is not "so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of trade or commerce." *Vacco*, 260 Conn. at 87.

ii. Codification of the Plain Meaning Rule Does Not Require that Prior Constructions of CUTPA Be Disregarded.

Connecticut courts have long held that CUTPA standing is limited to consumers of a defendant's products, business competitors of a defendant, and persons in a commercial relationship with a defendant. *See Ventres*, 275 Conn. at 157-58 (rejecting argument that CUTPA claimant was a competitor of the defendant and had CUTPA standing); *Pinette*, 96 Conn. App. at 778 ("[A] plaintiff must have at least some business relationship with the defendant in order to state a cause of action under CUTPA."). Plaintiffs argue that courts should no longer apply this prudential standing limitation, such that any person who suffers any ascertainable loss—regardless of their relationship with the defendant—will have standing to pursue remedies pursuant to CUTPA.

Plaintiffs argue that the "plain meaning rule" set forth in General Statutes section 1-2z to section 42-110g(a) compels their expansive view of CUTPA standing. Br. at 41. According to plaintiffs, opinions issued by this Court before the plain meaning rule was codified in 2003—in which interpretation of CUTPA standing was not confined by the text of section 42-110g(a), but also considered legislative history and purpose to determine legislative intent—should be disregarded. Plaintiffs' argument should be rejected for multiple reasons.

The legislature, in enacting Section 1-2z, did not intend that previous cases

interpreting statutes "in a manner inconsistent with the plain meaning rule" would be overruled. *Hummel v. Marten Transport, Ltd*., 282 Conn. 477, 501 (2007) (holding that section 1-2z "does not overrule our prior case law"); *see also State v. Flemke,* 315 Conn. 500, 506-07 (2015) (section 1-2z did not require court to "write on a blank slate" without regard to prior construction of mandatory sentencing statute). Legislative intent did not change simply because section 1-2z was enacted, and section 1-2z does not require that judicial determinations of the legislature's intent be revisited. Court decisions addressing and limiting CUTPA standing, which relied on legislative purpose and history to determine legislative intent, remain good law. The prudential limitation of CUTPA standing to consumers, business competitors, and others in commercial relationships with defendants remains consistent with CUTPA's fundamental purpose.[25]

[25] Amicus Curiae Law Center to Prevent Gun Violence ("LCPGV") argues that courts in six states have directly held that non-consumer plaintiffs need not have a business relationship with defendants to have standing under statutes similar to CUTPA. Br. of LCPGV at 1, 6. As an initial matter, LCPGV deems persuasive cases that have endorsed standing rules that are arguably broader than those Connecticut courts have applied to CUTPA claims, while waving off those decisions that have applied *narrower* standing rules to CUTPA-like statutes. *See, e.g.*, *Consumer Cellular, Inc. v. ConsumerAffairs.com*, 2016 WL 3176602, *9 (D. Or. Feb. 29, 2016) (limiting standing under Oregon Unlawful Trade Practices Act to consumers). At best, LCPGV's survey of other jurisdictions suggests that the existing prudential limitations on CUTPA standing place Connecticut somewhere in the middle of a spectrum of possible approaches to standing. In any event, the authorities upon which LCPGV relies are largely inapposite since the courts were not called upon to address specifically whether a business relationship is required for purposes of standing. *See, e.g., Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 169 (Fla. Dist. Ct. App. 2015) ("[T]he claimant…does not have to be a consumer in order to have standing"); *Maillet v. ATF-Davidson Co.*, 407 Mass. 185 (1990) (case not about standing, but court found claimant did not have to be a consumer or in privity with the defendant to have a claim). Indeed, many of the cases LCPGV cites support the proposition that standing to assert claims under similar statutes requires the existence of a business relationship. *See, e.g., Del Webb Comtys., Inc. v. Partington*, 652 F.3d 1145 (9th Cir. 2011) (plaintiff claimed that defendants threatened to harm plaintiff's business, reputation and good will); *North St. Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 953 N.Y.S.2d 96 (2d Dep't 2012) (acknowledging that plaintiffs were competitors of businesses with which defendant had contracted and that plaintiffs had

When construing statutes, a court's "only responsibility is to determine what the legislature, within constitutional limits, intended to do." *Flemke,* 315 Conn. at 512. Courts should not act as "plenary lawgivers" in construing statutes, attempting to determine legislative intent anew in every case. *Id.* The doctrine of *stare decisis* permits no other conclusion: "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." *Rivera v. Comm'r of Corr.*, 254 Conn. 214, 251 (2000). *Stare decisis* "allows for predictability in the ordering of conduct [and] promotes the necessary perception that the law is relatively unchanging." *State v. Peeler*, 321 Conn. 375, 378-79 (2016) (citation omitted). This Court has repeatedly observed that courts "should be especially wary of overturning a decision that involves a construction of a statute." *Flemke,* 315 Conn. at 512.[26]

iii. *Ganim* Does Not Support an Expansion of CUTPA Standing.

The remoteness doctrine is a prudential limitation on those who have standing to bring claims under any liability theory. The doctrine generally denies standing to persons whose

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"standing to challenge deceptive conduct practiced in favor of a competing business").

[26] The doctrine of legislative acquiescence also requires rejection of plaintiffs' expansive interpretation of CUTPA standing. Because the legislature is presumed to be aware of the courts' interpretation of statutes, the legislature's "subsequent nonaction may be understood as a validation" of those interpretations. *Freedom of Info. Officer v. Freedom of Info. Comm'n*, 318 Conn. 769, 786 n.8 (2015) (quoting *Caciopoli v. Lebowitz*, 309 Conn. 62, 78 (2013)); *Rivera*, 254 Conn. at 252. "Time and again" this Court has "characterized the failure of the legislature to take corrective action" once an "appropriate interval has passed" as a manifestation of "legislative acquiescence" in construction of a statute. *Hall v. Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 297 (1997); *Hummel*, 282 Conn. at 502 (the legislature's failure to act is "highly significant"); *see Flemke*, 315 Conn. at 512 (finding that fourteen years of inaction was a sufficient period of time to create the "inference that the legislature does not take issue with our interpretation"); *State v. Salamon,* 287 Conn. 509, 595-96 (2008) (Zarella, J., concurring in part and dissenting in part) (factors guiding legislative acquiescence analysis are the length of time since the court's construction, number of opportunities court has had to reconsider construction, and whether the legislature has had opportunity to affirm or correct construction).

injuries are indirect, or derivative of injuries to a third party. *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc*., 191 F.3d 229, 238-39 (2d Cir. 1999). The remoteness doctrine is distinct from the specific limitation imposed in CUTPA cases based on a plaintiff's lack of a consumer or business relationship with the defendant. *Ganim v. Smith & Wesson Corp*., 258 Conn. 313, 372 (2001). Plaintiffs must overcome both prudential limitations to pursue CUTPA claims—that is, they must have consumer or business relationships with the defendants *and* their injuries must not be remote and derivative of injuries to others.

Plaintiffs misread *Ganim* to hold that they need only plead a direct injury that is causally related to defendants' conduct to have CUTPA standing. Br. at 48. In *Ganim*, the City of Bridgeport asserted multiple theories of recovery against the defendant firearm manufacturers, including product liability, public nuisance, negligence, conspiracy, unjust enrichment and CUTPA claims. The City alleged that the business practices of the defendants resulted in the City having to pay costs associated with firearms violence inflicted on its citizens. *Id*. at 325-26. The Court held that the City's claimed injuries were too remote from the defendants' alleged conduct to give it standing to pursue any of its substantive causes of action and affirmed dismissal. *Id*. at 370 ("[T]he remoteness doctrine, as a limitation on standing…cuts across and applies to all of the plaintiff's substantive claims.").

The Court in *Ganim* observed that, in contrast to the City's alleged injuries, "primary victims" of firearms violence suffer injuries "at a level less removed" from the defendants' action than the City's losses. *Id*. at 359. The Court illustrated that when persons suffering direct injuries are before the court, the difficult problem of apportioning damages among plaintiffs "variously removed" from a defendant's conduct is not present—*under any theory of liability*. *Id*. at 358-59. The Court in *Ganim* did not hold that "primary victims" of firearms

violence had standing to bring CUTPA claims against firearm manufacturers with whom they have no consumer or business relationship, as plaintiffs argue.

Although the trial court in *Ganim* had held that "one must be either a consumer, competitor or in some business or commercial relationship with the defendant and, in that capacity, be affected by the defendants' unfair or deceptive conduct," this Court determined on appeal that it was "unnecessary" to consider this CUTPA-specific standing issue because the City's entire case was dismissed under the remoteness doctrine. *Id*. at 372; *see also Vacco*, 260 Conn. at 92 (holding that an indirect consumer of the defendant's software product lacked standing to bring a CUTPA claim because his injuries were too remote in relation to the defendant's conduct).

iv. Persons with Ascertainable Losses Have Been Denied CUTPA Remedies Despite the Broad Language of Section 42-110g(a).

This Court has not construed the "any person who suffers an ascertainable loss of money or property" language in section 42-110g(a) to prohibit prudential limitations on the reach of CUTPA.[27] On multiple occasions, this Court has limited the availability of CUTPA remedies to persons who have suffered direct ascertainable losses in trade or commerce. The notion that codification of the plain meaning rule prevents courts from imposing, for policy reasons, prudential limitations on the parties who appear before them, should be rejected. *See Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 37-38 (1997) (losses resulting from the entrepreneurial aspects of healthcare services may implicate CUTPA, losses resulting from medical malpractice do not); *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 731 (1993) ("[T]he non-commercial aspects of lawyering—that is, the representation of the client in a

[27] Indeed, courts have read this language in section 42-110g(a) as constraining the types of damages that are compensable under CUTPA. *See* Part III.F.4, *infra*.

legal capacity—should be excluded [from CUTPA liability] for public policy reasons."); *Russell v. Dean Winter Reynolds, Inc*., 200 Conn. 172, 175-84 (1986) (CUTPA does not apply to ascertainable losses resulting from the purchase and sale of securities).

If accepted, plaintiffs' view of CUTPA standing will unsettle these long-established precedents. The plaintiffs in *Haynes*, *Jackson*, and *Russell*—consumers of healthcare, legal, and financial services—suffered direct ascertainable losses in trade or commerce. The language in section 42-110g(a), if read as expansively as plaintiffs urge, would have permitted each of them to seek recovery of their losses under CUTPA. However, in each case the Court found prudential reasons to limit CUTPA's reach. Policy-based prudential limitations on CUTPA remedies are supported by a long line of Supreme Court precedent and should be honored in this case.

2. Plaintiffs' CUTPA Claims Are Barred by the CUTPA Statute of Limitations.

Plaintiffs filed their CUTPA claims in December 2014, more than three years after defendants manufactured and sold the firearm—in or prior to March 2010. Statement of Facts ("SOF") at 6. Plaintiffs' failure to bring their CUTPA claims within three years of defendants' alleged violations as required by General Statutes § 42-110g(f) is, therefore, an alternative ground on which to affirm the trial court's judgment.

A cause of action under CUTPA accrues upon the defendant's alleged violation, not when the violation is discovered. *Fichera v. Mine Hill Corp*., 207 Conn. 204, 213 (1988). The three-year limitation period for CUTPA claims reflects a policy judgment that, in order to protect businesses against stale claims and stale evidence, they should not be exposed to CUTPA liability more than three years after their alleged unfair conduct. *Flannery v. Singer Asset Finance Co.*, 312 Conn. 286, 323 (2014).

i. The CUTPA Time Limitation Is Jurisdictional and Must Be Satisfied.

This Court has long recognized that when a time limitation is contained in a statute that creates a right of action that did not exist at common law, the limitation is a substantive and jurisdictional prerequisite that must be met. *State v. Lombardo Bros. Mason Contractors, Inc*., 307 Conn. 412, 444 (2012). Unlike ordinary limitation periods that limit the availability of remedies, statutory limitations on statutory causes of action are defenses to liability. *Id.* They are "essential and integral" to the existence of the statutory cause of action itself. *Blakely v. Danbury Hosp.*, 323 Conn. 741, 749 (2016). This principle is deeply embedded in Connecticut law. Indeed, this Court recently confirmed that it would "continue to adhere" to "the long-standing jurisdictional characterization of such time limitations" in lieu of creating a rebuttable presumption in favor of subject matter jurisdiction. *Id.* at 749 n.5.

The three-year limitation period for CUTPA claims found in section 42-110g(f) is a jurisdictional prerequisite and essential to a cause of action under CUTPA. *Avon Meadow Condo. Ass'n v. Bank of Boston Conn.,* 50 Conn. App. 688, 700 (1998). If it is not met, a court does not have jurisdiction over a CUTPA claim. *See Blinkoff v. O & G Indus., Inc*., 113 Conn. App. 1, 8-9 (2009).

ii. All Jurisdictional Limitation Periods Must Be Satisfied.

The trial court did not apply section 42-110g(f) to plaintiffs' CUTPA claims but found that the claims were subject only to the two-year limitation period applicable to wrongful death actions found in section 52-555. The trial court's ruling cannot be reconciled with the jurisdictional nature of the defense provided by section 42-110g(f). Nor can it be reconciled with plaintiffs' "heavy burden" to establish that a jurisdictional limitation period is preempted by another limitation period. *Greco v. United Techs. Corp*., 277 Conn. 337, 350 (2006).

Under the trial court's analysis, plaintiffs may pursue CUTPA claims commenced after

the expiration of the jurisdictional limitations period—which is "essential and integral" to the cause of action itself—simply because a separate jurisdictional limitation applies and has been met. *See Blakely,* 323 Conn. at 749. A right to a jurisdictional defense, however, is not lost simply because the right to a different jurisdictional defense may not be asserted.

The application of a basic principle of statutory construction compels this conclusion. "[I]f two statutes appear to be in conflict but can be construed as consistent with each other, then the court should give effect to both." *Spears v. Garcia*, 263 Conn. 22, 32 (2003). Thus, when a single claim is subject to two different jurisdictional limitation periods, courts must require that both limitation periods be satisfied. Accordingly, the Court need not find that the jurisdictional limitation period found in section 42-110g(f) applies in lieu of the limitation period found in section 52-555 for defendants to prevail on statute of limitations grounds. Rather, to the extent that wrongful death damages are even recoverable under CUTPA, such an action must be brought within three years of the alleged CUTPA violation ***and*** within two years of death. That defendants have a jurisdictional defense to plaintiffs' CUTPA claim under section 42-110g(f), but not under section 52-555, is not determinative. What matters is that statutory liability under CUTPA extinguishes upon the expiration of the limitation period under section 42-110g(f), thereby preventing jurisdiction over plaintiffs' CUTPA claims.[28]

[28] Even if it were appropriate to make a choice between jurisdictional limitation periods, section 42-110g(f) would prevail over section 52-555 under the circumstances of this case. In *Doe v. Boy Scouts of Am. Corp*., 323 Conn. 303 (2016), the Court was confronted with two non-jurisdictional limitation periods that applied to the same claim but could not both be given effect—the limitation period applicable to general negligence actions and the limitation period specifically applicable to sexual abuse claims. The Court in *Doe* applied the "well established principle of statutory interpretation that requires courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute," and held that the limitation period specific to sexual abuse claims controlled. *Id*. at 342 (quoting *Housatonic R.R. Co. v. Comm'r of Revenue Servs.*, 301 Conn. 268, 301-02 (2011)). Here, the three-year limitation period found

The trial court did not address the jurisdictional nature of the limitation period found in section 42-110g(f). Instead, the court relied on *Pellecchia v. Connecticut Light & Power Co*., 52 Conn. Supp. 435 (2011), *aff'd in part, appeal dismissed in part,* 139 Conn. App. 88 (2012). The *Pellecchia* court, however, did not address whether section 52-555 trumped section 42-110g(f), or vice versa, because the plaintiff filed his wrongful death action within three years of the alleged CUTPA violation, satisfying section 42-110g(f), but failed to file his case within two years of death as required by section 52-555. *Id*. at 446. Thus, contrary to the trial court's reading, *Pellecchia* did not hold that a CUTPA claim seeking wrongful death damages is governed in all cases by only the limitation period found in Section 52-555. *Pellecchia* simply confirms that the failure to satisfy one of several applicable statutes of limitation with jurisdictional effect will result in dismissal of a claim.

3. Plaintiffs Have Alleged Product Liability Claims Barred by the CPLA.

The trial court rejected defendants' argument that plaintiffs' allegations regarding the alleged unreasonable dangers posed by the firearm were product liability allegations, which triggered the exclusivity provision found in the CPLA. Gen. Stat. § 52-572n (a product liability claim under the CPLA "shall be in lieu of all other claims against product sellers, including actions for negligence, strict liability and warranty, for harm caused by a product."). The trial court based its ruling on its belief that the "plaintiffs have not alleged liability based on a product defect," A184, but the trial court did not evaluate plaintiffs' allegations in light of this Court's recent decision in *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172 (2016).

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in section 42-110g(f) is the more specific statute. It applies specifically to a CUTPA cause of action seeking wrongful death damages, whereas the two-year limitation period under section 52-555 applies generally to all wrongful death actions brought under any theory of liability. Under the principle of statutory interpretation set forth in *Doe*, section 42-110g(f) trumps section 52-555 and plaintiffs' CUTPA-based wrongful death claim should have been dismissed. Under this analysis, the jurisdictional nature of section 42-110g(f) is preserved.

In *Izzarelli*, this Court clarified product liability law, specifically the design defect standard articulated in *Potter v. Chicago Pneumatic Tool Co*., 241 Conn. 199 (1997). The Court in *Izzarelli* relegated the "ordinary consumer expectation" test formulated in *Potter* to a narrow class of "cases in which a product fails to meet a consumer's legitimate, commonly expected safety expectations." *Id*. at 202-03. The Court held that, in all other cases, the "modified consumer expectation" test is to be applied. Under the "modified consumer expectation" test, a product "may be found defective in design . . . if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of the danger inherent in the challenged design outweighs the benefits of such design." *Id*. at 202.

Under the "ordinary consumer expectation" test, the plaintiff in *Izzarelli*, who sued a cigarette manufacturer for allegedly manipulating the nicotine content in cigarettes, would have had the difficult burden of proving that the cigarettes were defectively designed because the dangers inherent in cigarette smoking were beyond the contemplation of the ordinary consumer. *Id.* at 194. However, under the "modified consumer expectation" test, the plaintiff could prove a design defect with evidence that the cigarettes "could have been designed to be less dangerous without unreasonably compromising cost or utility." *Id*. at 202.

When viewed under the modified consumer expectation test embraced in *Izzarelli*,[29] the plaintiffs' allegations are plainly design defect allegations. *See* SOF at 6-7. Plaintiffs allege that the "risk" posed by the firearm's design characteristics outweighed its "utility" for

[29] The trial court incorrectly stated that "[u]nreasonably dangerous is defined under Connecticut law using the consumer expectation standard, which provides that the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." A184.

lawful uses, such as hunting, sport shooting and self-defense. A86, ¶217. This is design defect allegation under Connecticut law, and plaintiffs cannot escape that conclusion by labeling them otherwise. *See Pickering v. Aspen Dental Mgmt., Inc*., 100 Conn. App. 793, 799 (2007) (label plaintiff attaches to "mask" a cause of action is irrelevant).[30]

The California Supreme Court rejected an identical attempt to disguise a product liability action as a common law negligence claim in *Merrill v. Navegar, Inc*., 26 Cal. 4th 465 (2001), a case legally and factually similar to this case in nearly every respect. In *Merrill*, victims of a mass shooting sued the manufacturer of the firearm used in the shooting. The *Merrill* plaintiffs' theory was the same as the plaintiffs' theory in this case—given the firearm's design characteristics, "the benefits of making them available to the general public" did not "outweigh the risk they might inflict serious injury or death when discharged." *Id*. at 470. More specifically, the plaintiffs alleged (as plaintiffs in this case allege) that the firearm had no legitimate sporting or self-defense purpose; was well adapted to military assault on large numbers of people; was disproportionately associated with criminal activity; and the defendant should have known the firearm would be used in a mass shooting. *Id*. at 473. The plaintiffs also complained (as plaintiffs in this case similarly complain) that the manufacturer advertised the firearm in a way that allegedly appealed to criminals. *Id*. at 471 (citing advertisements indicating that the firearm had "excellent resistance to finger prints" and was "as tough as your toughest customer").

[30] In their brief, plaintiffs also characterize the firearm's design features in ways that fit the "modified consumer expectation" test. The firearm is alleged to "pose catastrophic risks to public safety" and to have little utility for lawful uses. Br. at 7, 8 n.11. Plaintiffs go on to describe the alleged "inherent dangerousness" of the firearm, *id*. at 20, and compare the firearm to others that plaintiffs perceive as less dangerous. Br. at 9; *see also Potter*, 241 Conn. at 221 ("The availability of a feasible alternative design is a factor that the plaintiff may, rather than must, prove in order to establish that a product's risks outweigh its utility.").

The plaintiffs in *Merrill* styled their causes of action as negligence and strict liability for abnormally dangerous activities, carefully avoiding the allegation that the firearm was defective. *Id*. at 473. Plaintiffs attempted to distance themselves from a product liability claim because a California statute provided that "[i]n a product liability action, no firearm . . . shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage or death when discharged." Cal. Civ. Code § 1714.4. [repealed by Laws 2002 A. 496 and S. 682 Sept. 25, 2002, effective Jan. 1, 2003].

The California Supreme Court saw through the *Merrill* plaintiffs' charade, holding that "[t]his is a products liability action based on negligence, which asserts that [the firearm] was defective in design because the risks of making it available to the general public outweighed the benefits of that conduct, and the defendants knew or should have known of this fact." 26 Cal. 4th at 481. Plaintiffs in *Merrill* could not "avoid this conclusion" by simply "declining to use the word "defect" or "defective" and "reformulating their claim as one for negligent distribution to the general public." *Id*. This conclusion was "fully consistent with the tendency among courts' . . . 'to view' claims of negligent distribution to the general public 'as being essentially design defect claims in disguise.'" *Id.* (citing Lytton, *Halberstam v. Daniel and the Uncertain Future of Negligent Marketing Claims Against Firearm Manufacturers*, 64 Brook. L. Rev. 681, 684 (1998)); *see also* Prosser & Keeton, Torts (5th ed. 1984) § 96, 688 (products liability includes manufacturer negligence "in marketing a product because of the way it was designed" where "a reasonable person would conclude that the magnitude of the reasonably foreseeable harm as designed outweighed the utility of the product as so designed").[31]

[31] The CPLA lists seller activities that are subject to its provisions. A claim for damages

Plaintiffs dispute that their claims are product liability actions based on defective design because, under the PLCAA, firearm manufacturers and sellers may not be sued for design defects in cases where the discharge of the firearm was "a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v) (providing that the criminal discharge of the firearm is considered "the sole proximate cause" of any resulting injuries). Thus, just as the *Merrill* plaintiffs sought to sidestep the California statute, the plaintiffs in this case have masked product liability claims to avoid the immunity provided by the PLCAA.[32]

4. Wrongful Death Damages Are Not Recoverable under CUTPA.

This Court has not directly addressed whether wrongful death damages are an "ascertainable loss of money or property" recoverable under CUTPA. Where wrongful death damages were sought under CUTPA, the Court has found other reasons to deny plaintiffs their requested remedies.[33] This case presents the opportunity to clarify the law by finding

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"caused by…marketing" is among them, and is listed separately from a claim for damages caused by "warnings" and "instructions." Gen. Stat. § 52-572m. Thus, product marketing defects are distinct from defects in warnings and instructions under Connecticut law, and are not interchangeable.

[32] This Court's decision in *Hurley v. Heart Physicians*, P.C., 278 Conn. 305 (2006), also supports the conclusion that plaintiffs have alleged a product liability action. In *Hurley*, the plaintiff claimed that the manufacturer of a pacemaker violated CUTPA when its representative orally advised the plaintiff's physician it was safe to adjust the rate of the pacemaker downward, despite contrary warnings that appeared in a technical manual provided by the manufacturer. The Court found this alleged CUTPA violation fell within the CPLA definition of a "product liability action," even though the gravamen of the alleged violation was manufacturer misconduct, not a dangerous condition of the pacemaker itself. Thus, the Court's conclusion that the personal injuries at issue "were caused by the defendant's pacemaker" was sufficient to trigger the CPLA's exclusivity provision and bar the *Hurley* plaintiff's CUTPA claim. *Id.* at 326.

[33] *See Haynes*, 243 Conn. at 38 (wrongful death plaintiffs not entitled to CUTPA remedies in medical negligence case because every medical negligence claim would "transform" into a CUTPA claim); *Gerrity v. R.J. Reynolds Tobacco Co*., 263 Conn. 120, 129-30 (2003) (wrongful death damages recoverable under separate CPLA claim).

that wrongful death damages are not recoverable under CUTPA because such damages do not result from the type of financial injury that CUTPA was intended to remedy.

An ascertainable loss "is a loss that is 'capable of being discovered, observed or established.'" *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co*., 287 Conn. 208, 218 (2008). Some elements of wrongful death damages are economic and "ascertainable" (*e.g*., burial expenses and ante-mortem medical expenses), while others are not economic and ascertainable (*e.g*., loss of spousal consortium, conscious pain and suffering, and destruction of the capacity to carry on life's activities). Non-economic wrongful death damages are akin to emotional distress damages, which most Connecticut courts have held are not an "ascertainable loss" recoverable under CUTPA. *See Di Teresi v. Stamford Health Sys. Inc*., 149 Conn. App. 502, 510-12 (2014). It would greatly complicate this area of the law to hold that some wrongful death damages are recoverable under CUTPA, while others are not.

This Court in *Gerrity* made it clear that the "type of damages permitted under CUTPA" was beyond the scope of the certified question it was asked to answer. 263 Conn. at 132. However, the Court signaled reluctance to permit recovery of wrongful death damages under CUTPA. In *Gerrity*, the plaintiff brought CUTPA and CPLA claims seeking wrongful death damages and a distinct category of financial losses based on the "higher price" the decedent had to pay for cigarettes as the result of the defendant's wrongful conduct. *Id*. at 129-30. The defendant argued that the CUTPA claim was barred in its entirety by the CPLA's exclusivity provision. The Court disagreed, because the plaintiffs' CUTPA count "in part" sought recovery for a financial injury recoverable under CUTPA—the higher price for cigarettes—which could not "reasonably be construed" to be a claim for wrongful death damages. *Id*.

There was no reason for the Court in *Gerrity* to separate the plaintiff's damages into

different categories if wrongful death damages were recoverable under CUTPA. It would have been simpler for the Court to avoid the issue altogether and find that all of the claimed losses—including wrongful death damages—were recoverable under CUTPA. But the Court did not do so, highlighting the analytical gymnastics courts must engage in when confronting claims for non-financial losses under CUTPA. It is implicit in this Court's ruling in *Gerrity* that financial losses are recoverable under CUTPA, but wrongful death damages are not.[34]

5. CUTPA Is Not a Predicate Statute under the PLCAA.

An action in which a firearm manufacturer "knowingly violated a State or Federal statute applicable to the sale or marketing" of a qualified product is an exception to PLCAA immunity. 15 U.S.C. § 7903(5)(A)(iii) (referred to as the "predicate exception"). Congress did not intend that alleged violations of broadly worded statutes of general application such as CUTPA were to serve as exceptions to immunity. Holding that statutes of general application qualify for the predicate exception would severely undermine congressional intent.

Application of the plain meaning rule to the PLCAA requires a finding that the statutes Congress had in mind as predicate statutes under section 7903(5)(A)(iii) are those that are enumerated as examples in the text of the predicate exception itself, and other similar statutes that also "actually regulate the firearms industry." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402-03 (2d Cir. 2008). This interpretation does not "yield absurd or unworkable results," but is entirely consistent with the overall purpose of the PLCAA: to provide immunity to firearm manufacturers and sellers who conduct their business activities

[34] Plaintiffs cite to three Federal Trade Commission ("FTC") decisions in footnote 33 of their brief for the proposition that damages for "physical injuries" are contemplated under CUTPA. However, none of the FTC decisions plaintiffs cite involved compensation for personal injuries or wrongful death. These FTC actions simply required businesses to "cease and desist" activities the FTC deemed hazardous to the public.

under the myriad federal, state and local laws applicable to their highly-regulated businesses. *See* Gen. Stat. § 1-2z; *see Heim v. Zoning Bd. of Appeals*, 288 Conn. 628, 637 ("We always must construe a regulation in light of its purpose."), *op. superseded by*, 289 Conn. 709 (2008).

i. CUTPA Does Not Expressly or Clearly Implicate the Sale or Marketing of Firearms.

As explained by the Second Circuit in *City of New York*, the predicate exception encompasses statutes that "expressly regulate firearms," or "that clearly can be said to implicate the purchase and sale of firearms." 524 F.3d at 404 (holding that the New York criminal nuisance statute was not "applicable to the sale or marketing of firearms"); *see also Ileto*, 565 F.3d at 1135-36 ("Congress had in mind only . . . statutes . . . that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry–rather than general tort theories that happened to have been codified by a given jurisdiction").[35]

Congressional intent is reflected in the examples of predicate statutes set forth in section 7903(5)(A)(iii). They include statutes dictating the records to be kept by sellers regarding firearm sales and prohibiting seller complicity in illegal firearm sales. 15 U.S.C. §§ 7903(5)(B)(iii)(I), (II). The Second Circuit in *City of New York* looked to these examples and applied two canons of statutory construction: *noscitur a sociis* (meaning of one term may be determined by reference to terms it is associated with) and *ejusdem generis* (general words should be limited to things similar to those specifically enumerated). *City of New York*, 524 F.3d at 401. The court held that New York's nuisance statute could not serve as a predicate statute under the PLCAA because it was not similar or related to the enumerated examples.

[35] *See* footnote 23, *supra* (referencing federal, state and local statutes regulating firearms).

Id. at 399-403. The court in *Ileto* reasoned that "there would be no need to list examples at all" if "*any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute." 565 F.3d at 1134 (emphasis in original).[36]

CUTPA is a statute of general application that creates an expansive liability scheme covering a broader range of business conduct than common law tort actions. *Associated Inv. Co. v. Williams Assoc. IV*, 230 Conn. 148, 156 (1994). Like CUTPA, the nuisance statute at issue in *City of New York* is a statute of general application. It prohibits conduct "unreasonable under all the circumstances" that endangers the public. N.Y. Penal Law § 240.45. The Second Circuit, relying on the overall purpose of the PLCAA, well-established canons of statutory construction, and legislative history, held that the New York nuisance statute did not "fall within the predicate exception to the claim restricting provisions of the PLCAA." *City of New York*, 524 F.3d at 400. The court's reasoning was straightforward: the New York nuisance statute was not the type of statute Congress intended to serve as a predicate statute because it neither "expressly regulat[ed]" nor could "clearly . . . be said to

[36] The examples set forth in § 7903(5)(B)(iii)(I) include language found in § 922(m) of the Gun Control Act, which makes it unlawful for sellers to knowingly fail to maintain required records of firearm sales or make false entries in those records. § 7903(5)(B)(iii)(II) refers to aiding and abetting violations of § 922(g) and (n) of the Gun Control Act, which identify the categories of persons who are prohibited from purchasing firearms. In any event, the Second Circuit's application of *ejusdem generis* was within the parameters of the plain meaning rule because it did not require leaving the text of the statute to determine meaning. *See Town of Stratford v. Jacobelli*, 317 Conn. 863, 873-75 (2015) (using *ejusdem generis* rule to find clear and unambiguous meaning); *Balloli v. New Haven Police Dep't*, 324 Conn. 14, 23-24 (2016) (using *ejusdem generis and noscitur a sociis* rules to determine legislative intent). The specific examples of statutes "applicable to the sale or marketing" of firearms included in the predicate exception help shape the more general description of predicate statutes. *Town of Stratford,* 317 Conn. at 872 ("[W]here a particular enumeration is followed by general descriptive words, the latter will be understood as limited in their scope to…things of the same general kind or character as those specified in the particular enumeration.").

implicate" the sale or marketing of firearms.[37] 524 F.3d at 404. The court expressly rejected an interpretation of "applicable to" to mean "capable of being applied," because it was a "too-broad reading of the predicate exception." *Id*. at 403. Such an interpretation would be an "absurdity" because it "would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from liability for harm caused by firearms that were lawfully distributed into primary markets." *Id*. at 401-03.[38]

CUTPA focuses broadly on "unfair or deceptive" conduct causing commercial harm. Gen. Stat. § 42-110b(a). The New York nuisance statute is equally broad, prohibiting "conduct . . . unreasonable under all the circumstances." N.Y. Penal Law § 240.45(1). Neither statute expressly references the sale or marketing of firearms. Although the court in *City of New York* stated that a predicate statute need not necessarily "expressly refer to the firearms industry," 524 F.3d at 401, it specifically held that "construing the term 'applicable to' to mean statutes that clearly can be said to regulate the firearms industry more accurately reflects the intent of Congress." *Id*. at 402. The court had little difficulty finding that section 7903(5)(A)(iii) did "not encompass" the New York nuisance statute. *Id*. at 404.[39]

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[37] The dictionary definition of "implicate" is "to be involve[d] in the nature or operation of something." WEBSTER'S NEW COLLEGIATE DICTIONARY, 605 (1987). A statute cannot be "applicable to the sale or marketing of firearms" without some aspect of firearms-related activity being inherent in the statute's purpose, or basic to its operation.

[38] A fundamental rule of statutory construction is that statutory exceptions are to be narrowly construed to preserve the primary purpose of the statute. *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Permitting CUTPA to serve as a predicate statute would not only swallow the PLCAA's purpose, it would render the PLCAA's other exceptions to immunity unnecessary, including the breach of contract or warranty, product liability, negligent entrustment, and negligence per se exceptions. *See* 15 U.S.C §§ 7903(5)(A)(ii), (iv). "Statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." *Housatonic R.R. Co. v. Comm'r of Revenue Servs*., 301 Conn. 268, 303 (2011) (citing *Semerzakis v. Comm'r of Soc. Servs*., 274 Conn. 1, 18 (2005) (Courts are to presume "the legislature did not intend to enact meaningless provisions.")).

[39] In the trial court, plaintiffs attempted to distinguish *City of New York* by arguing that the

In reaching the same conclusion, the court in *Ileto* found that legislators' "unanimously expressed understanding," that "sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations," was in "complete harmony" with the purpose of the PLCAA. 565 F.3d at 1137 (examining legislative history); *see also City of New York*, 524 F.3d at 402-03 ("[W]e think that the [congressmen's] statements nevertheless support the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry, in light of the statements' consistency amongst each other and with the general language of the statute itself.").[40]

The argument that a cause of action pursuant to a statute that is merely *capable of being applied* to the sale or marketing of firearms fits within the predicate exception has been flatly rejected by the Second Circuit and all other courts that have addressed the issue. *See City of New York*, 524 F.3d at 403 (finding this "a far too broad reading of the predicate exception"); *accord Ileto*, 565 F.3d at 1134 ("Indeed, if *any* statute that 'could be applied' to

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Second Circuit held that the New York statute was not "applicable to the sale or marketing" of firearms because "New York's high courts had already indicated disapproval of such a claim." AA at A85. Plaintiffs cited to *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (2001), but there the court simply rejected imposition of a common law duty on the part of firearm manufacturers and distributors to exercise ordinary care in marketing and distributing handguns. The plaintiffs in *Hamilton* did not plead a statutory nuisance action and the court did not address the state nuisance statute. Plaintiffs also relied on *People ex rel Spitzer*, 761 N.Y.S.2d 192, but there the plaintiffs did not plead a statutory nuisance claim pursuant to Penal Law § 240.45(a), and the court did not consider application of that nuisance statute to the defendants' alleged business activities. Rather, the court affirmed dismissal of a *common law* public nuisance action. *Id*. at 194 (noting that plaintiff did not appeal the trial court's dismissal of its statutory nuisance claim pursuant to Penal Law § 400.05(1)). Thus, there was no "context of prior decisions" by New York state courts addressing the viability of a cause of action against firearm manufacturers and sellers under the state nuisance statute, as plaintiffs claim. AA at A85. The Second Circuit rejected the New York statute as a predicate exception because it neither expressly regulated, nor clearly implicated the sale or marketing of, firearms. *City of New York*, 524 F.3d at 403-04.

[40] *State v. Courchesne*, 296 Conn. 622, 669 (2010) (if statute's language is not plain and unambiguous, or yields absurd or unworkable results, legislative history may be examined).

the sales and manufacturing firearms qualified as a predicate statute, there would be no need to list examples at all.") (emphasis in original). There is no way to shoehorn an expansive CUTPA action into the narrow section 7903(5)(A)(iii) exception without ignoring congressional intent. *See, e.g.*, *District of Columbia v. Beretta U.S.A. Corp*., 940 A.2d 163, 172 (D.C. 2008) ("Shoehorning, as it were, into the predicate exception [the D.C. Assault Weapons Manufacturing Strict Liability Act] that, at bottom, simply shifts the cost of injuries resulting from the discharge of lawfully manufactured and distributed firearms would, in our view, 'frustrate Congress's clear intention.'").[41]

In *City of New York*, the plaintiff complained about the sales and marketing practices of handgun manufacturers, claiming that they created a criminal marketplace for firearms. The court in *City of New York* "declin[ed] to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." 524 F.3d at 400. The court's observation is *dicta*, and it should be viewed in light of its holding, in which it "foreclose[d] the possibility" that the New York state nuisance statute could serve

[41] In *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), an Indiana appellate court found that the Indiana nuisance statute was "applicable" to the sale or marketing of firearms and could serve as a predicate statute under § 7903(5)(A)(iii), but did so for reasons not present here. The court's ruling was based on a pre-PLCAA decision in the case by the Indiana Supreme Court, which held that defendants' alleged violations of Indiana statutes "specifically applicable to the sale or marketing of firearms" gave rise to a statutory public nuisance claim. *Id*. at 430-32 ("Thus, even assuming that the PLCAA requires an underlying violation of a statute directly applicable to the sale or marketing of a firearm, the City has alleged such violations in their complaint."). In contrast, Plaintiffs here have not alleged that defendants violated any laws directly applicable to the sale or marketing of firearms. Moreover, the court in *City of Gary* relied on an interpretation of "applicable" by the district court in *City of New York* to mean "capable of being applied" (*id*. at 431), which has since been overruled and rejected by the Second Circuit as "a far too-broad reading of the predicate exception." *City of New York*, 524 F.3d at 400.

as a predicate statute under section 7903(5)(A)(iii), based on congressional intent to protect manufacturers and sellers from litigation when criminals misuse firearms. The Second Circuit provided no guidance on what type of "statute of general applicability" in another case "might qualify" as a predicate statute, what "circumstances" might exist to conclude that Congress intended for such a statute to serve as a predicate statute, or whether it was the "specific conduct that the City complain[ed] of" that led to the court's *dicta*.[42]

ii. Reliance on *Salomonson* Is Misplaced.

As noted above, the court in *City of New York*, offered its view that a predicate statute could be one that "courts have applied to the sale or marketing of firearms." 524 F.3d at 404. The trial court seized on this observation and found that CUTPA had been so applied in *Salomonson v. Billistics, Inc*., 1991 WL 204385 (Conn. Super. Ct. Sept. 27, 1991). Based on *Salomonson*, the trial court found that "CUTPA is a valid predicate statute." A172.[43]

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[42] Amicus Brady Center erroneously argues that, if this Court reinstates plaintiffs' CUTPA claims and finds they fit within the predicate exception to immunity under the PLCAA, then plaintiffs' "*entire suit* is exempted from PLCAA's restrictions." Br. of Amicus Brady Center at 1. The Court should not consider this argument because it was not made by plaintiffs. *See In re Bruce R*., 234 Conn. 194, 215 n. 16 (1995) (declining to consider amicus argument because it was not raised by the parties to the appeal). Regardless, this interpretation flouts the fundamental purpose of the PLCAA—to "prohibit causes of action" against firearm manufacturers and sellers. 15 U.S.C. § 7901(b)(1). A single cause of action in a multi-count complaint may qualify as a "qualified civil liability action" if it does not fall within one of the six enumerated exceptions to immunity. 15 U.S.C. § 7903(5)(A) ("The term…means a civil action or proceeding or an administrative proceeding brought by any person…"). There is no basis in PLCAA's plain language, structure or purpose to conclude that Congress intended the predicate exception to serve as a "super exception" that eliminates immunity for all other causes of action, instead of just one exception in a series of six enumerated actions for which there is no immunity. None of the cases Brady Center cites provide a well-reasoned basis for this bizarre interpretation of the PLCAA. *See Ramos v. Wal-Mart Stores, Inc*., 202 F.Supp.3d 457, 464-66 (E.D. Pa. 2016). In any event, plaintiffs waived this argument by failing to raise it before the trial court in opposing defendants' motions to strike. *See, e.g.*, *Doyle Grp. v. Alaskans for Cuddy*, 164 Conn. App. 209, 224 (2016).

[43] The trial court also cited to this Court's opinion in *Ganim,* believing that the Court "expressly left open the possibility that a CUTPA claim based on a defendant's misleading marketing of

Salomonson was a case involving the disappointed commercial expectations of a firearms collector, who contracted with the defendant to have certain remanufacturing work performed on his own firearms. 1991 WL 204385, at *10. The defendant was also to prepare and submit applications to the federal government for approval to perform the work and transfer the firearms back to the plaintiff when the work was completed and approved. *Id*. The case did not involve the sale or marketing of firearms by the defendant—the firearms were already owned by the plaintiff. Despite the defendant's promises, he did not timely deliver plaintiff his firearms, and he allegedly made deceptive statements regarding the status of government approval. *Id*. The defendant's failure to deal in good faith with the plaintiff was found to be oppressive and in violation of CUTPA. *Id*. at *14.

The trial court's reliance on *Salomonson* was error. *Salomonson* was not an application of CUTPA to the sale or marketing of firearms by a Connecticut court, and cannot be cited for the broader proposition that CUTPA "clearly can be said to implicate" the "sale or marketing" of firearms in the context of the PLCAA and its purpose. *See City of New York*, 524 F.3d at 403-04.

IV. CONCLUSION

Based on the foregoing, the judgments for the defendants should be affirmed.

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firearms could be maintained by appropriate plaintiffs who are less removed" from a defendant's alleged conduct. A172. Plaintiffs misleadingly suggest that in *Ganim* the Court "addressed CUTPA claims based on [the] firearm industry's marketing and sale of handguns." Br. at 39. *Ganim* cannot be read so expansively. In *Ganim*, this Court affirmed dismissal of all claims brought by the City under the remoteness doctrine. 258 Conn. at 370. It did not address whether CUTPA claims by direct victims of firearms violence would suffer from other problems, specifically whether their injuries would be an "ascertainable loss of money or property," or whether non-consumer victims would have standing to bring a CUTPA claim. Most importantly, this Court did not hold that CUTPA qualified as a statute applicable to the sale or marketing of firearms under the PLCAA. Indeed, *Ganim* was decided before the PLCAA was enacted.

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify, on this 10th day of May, 2017, the following:

1. The Brief and Appellees' Appendix comply with the format requirements of the Rules of Appellate Procedure § 67-2.

2. The printed Brief and Appellees' Appendix were mailed postage prepaid to:

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3. The Brief and Appellees' Appendix have been redacted and do not contain any names or other personal identifying information that is prohibited from disclosure.

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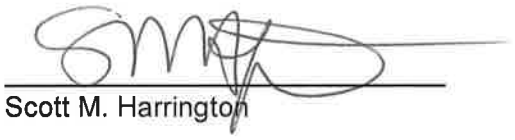

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